IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 79.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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WESTERFIELD-BONTE CO. • INCORPORATED • LOUISVILLE, KY.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT

BRIEF FOR THE RESPONDENT.

The Respondent accepts, pursuant to Rule 40(3) of United States Supreme Court, the presentment in Petitioners' Brief of Orders and Opinions below; Jurisdiction; and Statement of the Case.

STATUTE AND RULE INVOLVED.

Sections 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h), are set forth in the Appendix (*infra*, pp. 75-77). Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. 102.13, is set forth in the Appendix (*infra*, pp. 77-79).

QUESTIONS PRESENTED.

1. Whether the Respondent Employer may challenge in an unfair labor practice proceeding the determination of the National Labor Relations Board that a union is in compliance with Section 9(h) of the National Labor Relations Act when that determination is based on an alleged erroneous construction of the statute.

2. Whether the application in this case of the Board's "constitutional" test for determining who are officers required to file non-Communist affidavits under Section 9(h) of the National Labor Relations Act is erroneous.

SUMMARY OF ARGUMENT.

I.

The fundamental ground of difference between the Respondent and the Board lies in the construction of the term "officer" applied by the Board in determining whether a union is in compliance with Section 9(h). The Respondent contends that "officers", as it appears in Section 9(h), must be defined so as to include all union executives whose duties, responsibilities, and influence in unions measure up to those of an "officer" as that term is ordinarily understood (the "functional" test). The Board, however, defines the "officers" of a union as only those who hold positions designated as offices in the constitution of the union (the "constitutional" test).

Under this "constitutional" test the Board has no cause to consider and evaluate the facts as to particular union executives' duties and functions in determining the question of officership, and in effect treats such facts as irrelevant. The Respondent contends that the Board's test is too narrow. It is asserted that other union executives, besides those denominated in the constitution of a labor organization may properly be held to be "officers," if they are found, upon an investigation of their duties and functions, to possess the characteristics of commanding power, prestige, and influence in union affairs, commonly associated with the idea of official leadership.

"constitutional" test in deciding the case,[10] it could in the enforcement proceedings in the Circuit Court of Appeals seek to challenge the Board's "constitutional" test.

Respondent does not quarrel with the Board's view (Petitioner's brief, pp. 15-48)—which is that the compliance status of a union is exclusively a matter for it, as the appropriate administrative agency, to determine without the right of the Respondent to raise this question in an unfair labor practice proceeding—in its entirety. The Respondent does contend that it properly could challenge the legal basis of the Board's ruling that Mr. Taylor was not an officer and hence need not have filed an affidavit for the C.I.O. to be in compliance. But Respondent does not assert any right to contest the Board's determination of issues of fact in regard to a union's compliance status. This case presents no such instance of an administrative determination of a fact. This case does not, for example, involve a situation where the Board asserts, and the Respondent denies, that Regional Director Taylor, has in fact filed an affidavit. Nor is there a dispute as to the veracity of

[10] "There was, of course, always the chance that the Board would decide to depart from a strict application of the "constitutional" test. Indeed, Chairman Farmer and Member Rodgers of the Board in ruling on this case reserved opinion as to whether the "constitutional" test could be taken as "the exclusive basis for determining compliance" in all cases, although they joined "in this decision as a proper application of the existing rule" (R. 531a, fn. 15). Farmer and Rodgers did not indicate why they thought the "constitutional" test might not necessarily be the sole basis of deciding compliance in other cases but found its application in this case proper.

The Respondent thus seeks to challenge the Board's determination of compliance on a point of law, the definition of "officers" applied by the Board in administratively determining the compliance status of unions. Respondent does not assert that a party to a labor hearing has the right to contest the Board's *ex parte* administrative conclusions on factual issues in respect to a union's compliance status. But, it submits, the Board's definition of "officers" is subject to judicial review.

Previous judicial decisions plainly establish the right of the Respondent to challenge the Board's definition of "officers" in the manner here contended for. The opinion of this Court in *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326 (1951), authoritatively establishes the right of a party to an unfair labor practice proceeding to challenge the legal construction of Section 9(h) applied in determining the compliance of a union with Section 9(h), since the issue goes to the heart of the validity of the labor case proceedings and the Board's decision of the case. Consistently with the *Highland Park* decision, the Courts of Appeals, in regard to questions of compliance with Section 9(h), have drawn a sharp line between the non-litigability of issues of fact which have been resolved by the Board in its *ex parte* administrative determination of union compliance with Section 9(h), and, on the other hand, the right of an employer to challenge the legal basis of the Board's administrative determination of the compliance status of a union.

The Respondent finds in the legislative history of Section 9(h) an utter absence of any expression of in-

affidavits on file."[11] Also, there is here no question of conflicting factual inferences sought to be drawn from established facts. It would be a different case if the Board had ruled, either upon hearing the rejected proof in regard to Mr. Taylor's position which the Respondent offered or upon an independent investigation of the facts as to Mr. Taylor's role in labor affairs in Kentucky, as follows:

> "Upon an examination of the facts as to the duties and functions exercised by Regional Director Taylor, we have concluded that his power and influence in union affairs and labor relations is actually too insignificant and unimportant for him to be considered an officer within the meaning of Section 9(h)."

Respondent does not assert a right to challenge the Board's ruling in respect to such factual conclusions, but the Board has not considered the facts as to Mr. Taylor's position and made findings. Indeed the Board has treated such facts and the possible inferences to be drawn from them as irrelevant. In effect the Board finds:

> "Under our 'constitutional' test, Mr. Taylor is not, as a matter of law, to be considered an officer because his position is not, and never has been, denominated an officer in the C.I.O. constitution, regardless of what control he exercises over

[11] A similar example would arise where an employer contested the completeness in form and content of affidavits on file. The Board necessarily finds that the affidavits on file are sufficient in form and content in making its administrative determination of compliance (Petitioner's brief, p. 17).

tent on the part of the enacting Congress that the Board's definition of "officers" should not be subject to challenge by a party to a labor case proceeding. Since Congress did not indicate that the legal construction of Section 9(h) was to be left exclusively to the Board, it is to be assumed that Congress intended that the Board's interpretation of the term "officers" be subject to judicial review, as the *Highland Park* decision plainly indicates.

Contrary to the Board's suggestion, Respondent contends that hearing the Respondent's evidence, which had a direct bearing on the correctness of the Board's construction and application of the term "officer", would not have materially protracted the hearing of the case. Furthermore, the Respondent places the blame for any delay which would result from hearing evidence on the duties and functions of labor leaders in this or future labor cases upon the Board's practice of deciding the question of officer status on the sole basis of whether a man's position is designated an office in a union constitution. For if the facts as to the duties and functions of labor leaders are relevant and necessary to the decision of whether a man is an officer or not (as Respondent contends) and, if, nevertheless, the Board fails (as it does) to consider such facts in making its administrative determination of compliance, then the only opportunity for the consideration of such facts is in the labor case hearing itself. On the other hand the Board could adopt the "functional" test and base its *ex parte* administrative decision of officership upon a consideration of the duties and functions of

labor leaders. Its factual administrative determination of officership would then be conclusive in the labor proceeding itself in the light of the cases which hold that the Board's administrative determination of questions of fact in regard to a union's compliance status are not litigable in labor case hearings.

II.

Finding and applying the correct definition of "officers" is a matter of the greatest importance in view of the strong anti-Communist labor policy embodied by Congress in Section 9(h). Respondent contends that the Board's "constitutional" test approach to the problem is fundamentally unsound because under it the Board does not have occasion to investigate and evaluate the facts as to the positions which union executives hold—in short, the realities of union leadership—in determining compliance questions.

The legislative history of Section 9(h) indicates that Congress understood the term "officers" to mean important union "leaders" who are in positions of "authority and control." In the light of this legislative history, the Board's test is too narrow. There are union executives, such as Regional Director Taylor, who possess the characteristics of leadership to a degree which touches official stature within the understanding of the legislators of Section 9(h), even though they are not designated as "officers" in their union's constitution.

Such union leaders, who enjoy positions of "authority and control" in the unions, are within the definition

tends, where the basic issue is the construction of the language of Section 9(h) applied by the Board in deciding a union's compliance status. Therefore, we submit, the Court of Appeals correctly ruled that the Respondent should have the opportunity to establish that "the functions and jurisdiction of said W. B. Taylor" are legally relevant to the question of whether Regional Director Taylor is to be considered an officer whose compliance with Section 9(h) was indispensably necessary to the validity of the Board's decision on the unfair labor practice charges.

I.

The Respondent Has the Right to Challenge the Determination of the Board That a Union Is in Compliance With Section 9(h) When That Determination Is Based on an Alleged Erroneous Construction of the Statute.

A. PRIOR JUDICIAL DECISIONS ESTABLISH THE RIGHT OF A PARTY TO THE UNFAIR LABOR PRACTICE PROCEEDING TO CHALLENGE THE BOARD'S ADMINISTRATIVE DETERMINATION OF THE COMPLIANCE STATUS OF A UNION IN RESPECT TO ISSUES OF LAW.

Previous judicial decisions under Section 9(h) clearly indicate the extent to which the courts have recognized the right of a party to unfair labor practice proceedings to challenge the Board's determination of the compliance status of a union.

Section 9(h) of the Act plainly provides that the Board is prohibited from issuing a complaint pursuant to a charge to unfair labor practice made by a labor organization where officers of the charging union or its affiliates have not complied with the affidavit-filing re-

of "officers" under the "functional" test, but are erroneously excluded under the "constitutional" test.

Furthermore, judicial consideration of the term "officers" reiterates the emphasis of the enacting Congress on qualities of "leadership" as the keynote of the meaning of the term "officer." And the authoritative pronouncement of this Court in the *Highland Park* case, and also a decision of a Seventh Circuit (as well as the ruling of the court below) indicate that the Board's test is too restrictive, and these decisions establish the correctness of the Respondent's "functional" test.

Both parties agree that the term "officer", as it appears in Section 9(h), is to be defined in its ordinary and usual sense. But the Board's "constitutional" test in fact is only consistent with a narrow definition of the term applied in deciding technical questions of the law of corporations and not with the ordinary meaning of the word. Reference to the dictionary definition and other authorities demonstrates that the "functional" test follows the usual definition of the term.

The Board's definition of "officers" is patently arbitrary and unreasonable because it mechanically decides the question of officership in respect to every sort of labor organization without regard to size or rank in the structural hierarchy of organized labor. In making the determination of officer status turn on the sole basis of the list of officers contained in a union constitution, the Board disregards the fact that the positions designated as offices in the constitutions of various unions may differ widely. Marked disparity may occur even

quirement of the Section. The courts following the clear command of Section 9(h), have repeatedly held that, where unions have not made timely compliance with the affidavit-filing requirement of the section, the Board is precluded from exercising its functions at the instance of such non-complying unions. *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322 (1951)[13]; *National Labor Relations Board* v. *Clark Shoe Co.*, 189 F. 2d 731 (1st Cir. 1951); *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650 (6th Cir. 1954); *Goodman Mfg. Co.* v. *National Labor Relations Board*, —— F. 2d —— (7th Cir. Nov. 10, 1955); *National Labor Relations Board* v. *Postex Cotton Mills*, 181 F. 2d 949 (5th Cir. 1950).[14]

[13]In *National Labor Relations Board* v. *Dant*, 344 U. S. 375 (1953), this Court also clearly indicated that the Board should not issue a complaint of unfair labor practice charges on behalf of a non-complying union. The specific issue involved in that case related to the exact time as of which the union must come into compliance with Section 9(h). The C.I.O. officers had filed affidavits prior to the issuance of a complaint by the Board, but subsequent to the filing of the charge of unfair practice by the charging union, an affiliate of the C.I.O. This Court held, by a literal reading of Section 9(h), which provides that "no complaint shall be issued pursuant to [an unfair labor practice] charge made by a labor organization . . . ." unless the requisite non-Communist affidavits are on file, that such compliance with Section 9(h) before the complaint was issued satisfied the requirements of Section 9(h). In reaching this decision, the opinion specifically pointed out that this interpretation of Section 9(h) would not give any benefit to a union which continued to be in non-compliance. For the Board could not issue a complaint during such non-compliance, and absent "the issuance of a complaint the filing of a charge is a useless act." 344 U. S. at 382, 383.

[14]The Petitioner cites (Petitioner's brief, p. 26) several cases wherein the Courts of Appeal have held that the Board need not allege and prove that the unions involved in a labor proceeding were in compliance with Section 9(h). However, these cases are not contrary to the above-cited cases. For as the Court said in *National*

(Footnote continued on following page)

as between two labor organizations of comparable size and activity.

The Board's definition of "officers" is not entitled to the judicial deference which Respondent claims for it. Both sides agree that the proper definition of "officer" should be the ordinary and usual meaning of the term of "officer", although they disagree as to what that meaning is. Since the question is simply one of the ordinary meaning of the words of the statute, it is appropriate for the Court to exercise in this case the fullest scope of its reviewing powers. Furthermore, the Board's definition of "officers" is not entitled to "peculiar weight" as the construction of the statute by the agency entrusted with its administration, as the Board contends, since the Board has in effect, by it "constitutional" test, improperly sub-delegated the responsibility for determining the application of the term "officer" to the very unions which it was the purpose of Congress to regulate.

It has been held by the Courts of Appeal, that an employer might not raise and litigate the question of compliance with Section 9(h) by the union in the Board's proceedings where the employer sought to challenge the Board's determination in respect to a question of fact involved in the union's compliance status. *National Labor Relations Board* v. *Vulcan Furniture Mfg Corp.*, 214 F. 2d 369, 371 (5th Cir. 1954), *cert. denied*, 348 U. S. 873 (1954), *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (7th Cir. 1954). Neither of these cases, however, is in conflict with the decision of the Court below, for the reason that each of these cases decided only that a party to an unfair labor practice proceeding may not litigate questions of fact in regard to the compliance status of a union.

In *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (5th Cir. 1954), *cert. denied*, 328 U. S. 873 (1954), the Court held that the truthfulness or completeness of the non-Communist affidavits may not be litigated in an unfair labor practice proceeding. Since Respondent does not in this case urge that any of the union affidavits on file were false or insufficient, the problem of the *Vulcan Furni-*

Labor Relations Board v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650 (6th Cir. 1954), after noting and approving the decisions of a number of cases holding that the Board is not as a technical matter required to allege and prove that the union is in compliance: "This, of course, does not mean that compliance is not necessary in order for the Board to proceed. Compliance is necessary and failure to comply is a statutory bar to the proceeding." Certainly these cases do not hold that a party to a labor case may not challenge the definition of "officers" which the Board applies in deciding the compliance status of unions, which is the issue here.

ARGUMENT.

INTRODUCTION.

The issues in this case center around two major questions, (1) whether a party in an unfair labor practice proceeding may challenge the Board's determination that a union is in compliance with Section 9(h) on a fundamental point of law, namely, the definition of "officers" upon which the Board based its determination of compliance, and (2) whether the Respondent is correct in maintaining that the Board's definition of "officers", who are required by Section 9(h) to file affidavits, is clearly wrong. However, these two questions are, in the Respondent's view, closely interrelated. Therefore, it would appear appropriate briefly to analyze both questions together with a very summary reference to the manner in which these questions happen to come before this court, in order to clarify the fundamental problems raised by this case.

This case arises from an unfair labor practice proceeding. In this proceeding the Respondent questioned the jurisdiction of the National Labor Relations Board to decide the merits of an unfair labor practice proceeding on the ground that the Congress of Industrial Relations (C.I.O.), with which the charging union herein, the United Brewery and Soft Drink Workers, Local 20 (The Union), is affiliated, was not in compliance with Section 9(h) of the National Labor Relations Act (29 U. S. C. Section 159(h)). That section provides that the Board shall not investigate any question

concerning the representation of employees nor issue any complaint pursuant to a charge of unfair labor practice unless each officer of the labor organization seeking to invoke the machinery of the Act, and each officer of any national or international union with which the charging union is affiliated shall have filed with the Board an affidavit stating that he is not a member of the Communist Party or supports any organization that believes in or teaches the overthrow of the Government by force or illegal methods. Specifically, the Respondent contended that the conceded failure of one W. B. Taylor, Regional Director in the Commonwealth of Kentucky for the C.I.O., to file a non-Communist affidavit rendered the charging Union in non-compliance with Section 9(h) and precluded the Board from proceeding with the case.

In the hearing before the Trial Examiner, Respondent offered to show that Mr. Taylor occupied so important a position of responsibility and authority in the affairs of the C.I.O. that he was able to exercise great influence on the C.I.O. unions operating in Kentucky and in labor relations there.[1] Respondent's view was that one holding such an important executive post must be considered to be an "officer" of the C.I.O. within the meaning of Section 9(h), and, therefore, that Mr. Taylor must file a non-Communist affidavit regardless of the fact that the particular position held by Taylor was not listed as an office in the C.I.O. constitution, which was the Board's test for requiring the affidavit.

[1] R. 388a, 389a, 517a, 527a.

National Labor Relations Board v. *Louisville Cement Corporation*, 209 F. 2d 651, 653, decided by the Sixth Circuit the same day it rendered the opinion in the *Sharples* case, that Court held, citing the *Sharples* case, that the verity of affidavits, an issue of fact, is not a litigable matter before the Board.

The Courts of Appeal, however, have refused to apply the rule that questions of the compliance status of a union are not to be litigated in labor case proceedings, if the challenge goes to the *Board's determination of compliance on a point of law*, which is the basis for the challenge made in the instant case. To Respondent's knowledge, there have been only two cases reaching the Courts of Appeal in which parties to the proceeding before the Board have sought to contest whether or not the union involved was in compliance with Sec-

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not litigable in an unfair labor practice proceeding, meant only to uphold the Board's exclusive right to determine the facts as to a union's compliance status. This the court stated that "Congress may delegate the power to find or determine some *fact* or situation on which the operation of a law is conditioned . . . . Any action taken by the Board in this respect is in the nature of an investigation . . . and can be conducted on an *ex parte* basis. The *factual* determination of this question will thus be applicable to all unfair labor practice proceedings in which a particular union is involved with different respondents." (209 F. 2d at 654. (Emphasis added.) The Court at page 654 further quoted a passage from *National Labor Relations Board* v. *Wallick*, 188 F. 2d 917, 922 (6th Cir. 1951), *cert. denied* 342 U. S. 820, *Allen Archer Pipes, Inc.* v. *National Labor Relations Board*, 342 U. S. 820 (1951), where the Court in turn had quoted from the Report of the Joint Congressional Committee on Labor-Management Relations to Congress in 1948 (S. Rep. No. 986, Part 3, 80th Cong. 2d Sess., p. 45) wherein the Committee had anticipated that the "verity of the affidavit or the facts as to it having been filed" should not be litigable in labor case proceedings, such questions as the verity of affidavits or whether or not affidavits are on file are, of course, questions of fact, which have nothing to do with the construction and definition of the language of Section 9(h).

The Trial Examiner noted that it had been conceded that Mr. Taylor had not filed a non-Communist affidavit,[2] but he rejected Respondent's offer of proof as to the functions and power exercised by Mr. Taylor.[3]

The basis for the Trial Examiner's ruling was that questions of the compliance status of a union were for the administrative determination of the Board and were not litigable by the parties to an unfair labor practice proceeding. Furthermore, he indicated, the Board had determined that the unions involved were in compliance with Section 9(h) and that this determination of the Board was founded upon the fact that all the officers of the unions involved, who were listed as such in the unions' constitutions, had filed affidavits. The Board's determination of compliance was reached by the application of Section 102.13 (b) (3) of the Board's Rules and Regulations which defines "officer" as follows:

> "'The term 'officer' . . . shall mean any person occupying a position identified as an office in the constitution of the labor organization . . .'"[4]

The Board thereafter sustained the Trial Examiner's ruling on the same grounds, namely, (1) that the compliance status of a union was not litigable in unfair labor practice proceedings, and (2) that in any case the Board's administrative determination of compliance was correct since Mr. Taylor was not to be con-

[2] R. 517a, 388a.
[3] R. 517a.
[4] R. 516a-518a. The full text of Section 102.13 is set out in the Appendix, pp. 77-79.

tion 9(h), by challenging the definition of "officers" applied by the Board in determining the compliance status of such unions. These two cases are the Sixth Circuit's decision in this case and the *Goodman Mfg. Co.* v. *National Labor Relations Board*, ——F. 2d——, decided by the Seventh Circuit on November 10, 1955 (and since certiorari was granted herein). In both these cases the employers attacked the compliance of the unions involved by squarely challenging the definition of "officers" which the Board applied in making its determination that the unions were in compliance, that is, on a point of law. Both courts upheld the right of the employer to question the legal basis of the Board's determination of compliance.[16]

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[16]The Seventh Circuit in the *Goodman* case said:

"[T]he Board's present contention [that an employer may not litigate the compliance issue in an unfair labor practice proceeding] is too broad, for the Supreme Court [in *National Labor Relations Board* v. *Highland Park*, 341 U. S. 322, 325, 326 (1951)] has recognized that under some circumstances there may properly be judicial review of a union's compliance status. . . . It appears that courts ought not inquire into the factual or merely formal aspects thereof. Thus, in *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, it was held that the 'veracity' of a non-Communist affidavit, admittedly filed, could not be litigated in an unfair labor practice proceeding. Similarly, in *N.L.R.B.* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, the issue of 'the truthfulness of the affidavits' or 'whether the ostensible officers filing them are the true directors of the union involved' were outside the scope of judicial review. . . . [But in] *N.L.R.B.* v. *Coca-Cola Bottling Co. of Louisville*, 219 F. 2d 441 . . . wherein the Court of Appeals for the Sixth Circuit, notwithstanding the Board's contention that such a matter could not be litigated by the employer, ordered the Board's trial examiner to take evidence with respect to the status and jurisdiction of one Taylor, the C.I.O. Regional Director for Kentucky, who admittedly had not filed a non-communist affidavit. The court's order was based squarely on the employer's right to judicial review of

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sidered an officer because his position in the C.I.O. was not denominated as an "office" in the C.I.O. constitution.[5]

The fundamental ground of difference between the Respondent and the Board lies in the construction of the term "officer" which should be applied to determine which functionaries in a union are brought within the filing requirements of Section 9(h) of Act; and, hence, who must file affidavits before the Board may take jurisdiction of an unfair labor practice charge. The Board has adopted the rule that, absent evidence of intent of purposeful evasion of the filing requirements of Section 9(h),[6] only persons whose positions are so designated in the union constitutions are to be considered "officers" for the purpose of Section 9(h). The Board does not at any point investigate or consider the facts as to the functions and duties, or the relative power and influence, of union executives in determining which union functionaries are to be considered officers within the meaning of the filing requirement of Section 9(h).[7]

[5] R. 527a-531a.

[6] R. 528a; N.L.R.B. Rules and Regulations, Section 102.13 (b) (3) (Appendix, p. 79). Apparently the sole factor which the Board regards as indicative of a possible intent to evade the filing requirements of Section 9(h) is whether or not a particular position has been dropped from a union constitution at any time since the Taft-Hartley amendment introduced Section 9(h) into the National Labor Relations Act (see fn. 7, *infra*). In this case the Board pointed out that Taylor's position had not, even in the year before the Taft-Hartley Act, been listed in the C.I.O.'s constitution as an office (R. 531a).

[7] It is clear that the Board made no investigation of Regional Director Taylor's functions and duties in administratively deter-

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A comparison of the decisions of the Sixth Circuit in the *Sharples* case (*supra*, pp. 22, 23), and in the *Louisville Container Corporation* case (*supra*, p. 23), with the ruling of that court in this case, and of the decision of the Seventh Circuit in the *American Rubber Products* case (*supra*, pp. 21, 22), with its holding in the *Goodman Mfg. Co.* case, clearly illustrates that those courts have drawn a sharp line as to the extent to which the compliance status of a union can be the subject of litigation. On the one hand it is held that a party to a proceeding may not contest and litigate the Board's administrative determination of questions of fact in regard to union's compliance status. On the other hand both courts uphold the right of a party to be heard on the issue of the construction of Section 9(h) which the Board applies in determining compliance questions.

The *Goodman Mfg. Co.* case and the opinion below recognizing the right of the employer to challenge the Board's definition of the term "officer" are consistent with other cases which have upheld the right of a party to a labor proceeding to challenge the Board's construction of Section 9(h) on other points of law. In *National Labor Relations Board v. Clark Shoe Co.*, 189 F. 2d 731 (1st Cir. 1951), the question was whether, under Section 9(h), the filing of affidavits by officers of the C.I.O. subsequent to the filing of unfair labor practice charges by a C.I.O. affiliated union and after the Board

the substantial legal aspects of the compliance issue, and it cited as authority the *Highland Park Mfg. Co.* case.

[W]e think that the statement of law [in the *Coca Cola Bottling Co.* case] is correct and not in conflict with those decisions holding that the factual and formal aspects of compliance are outside the scope of judicial review. . . ."

The Respondent on the other hand contends that this definition is too narrow and cannot be the sole basis

mining the compliance of the unions herein involved with Section 9(h). As the Trial Examiner plainly indicated, the Board's *ex parte* administrative determination of compliance was limited to finding out that "all individuals holding positions designated as offices by the constitution and by-laws of the respective labor organizations herein . . . including the C.I.O., had duly complied with the requirements of subsection (h) by timely filing the non-Communist affidavit required by that subsection." (R. 516a-517a). So far as the Board was concerned, the question as to Taylor's status was at an end when it found that "it does not appear . . . that Taylor is a person occupying [a position identified as an office] in the current C.I.O. Constitution." (R. 530a-531a).

Indeed it is equally clear that the Board's general *ex parte* administrative practice in determining the compliance of a union with Section 9(h) is limited to checking the affidavits of union leaders on file with the list of officers contained in the Union constitution (Petitioner's brief, pp. 16-19, 39-41). The Board indicates (Petitioner's brief, pp. [illegible], 40, 41), that it also checks the affidavits on file with a certificate of union officers required by the Board to be filed by labor unions (Form NLRB-1080), but as this certificate itself only contains a list of the positions designated as offices in the union consitution, this cross-check does not involve an investigation of the duties and functions of union leaders, and in particular of those who are not listed in a union's constitution). And once having administratively decided who are the officers of a union involved in a labor case proceeding and that they have complied with Section 9(h), the Board prevents a party to the proceeding from therein offering for the Board's consideration evidence as to the duties and functions of a labor leader whose position is not constitutionally-designated an office by the rule that matters of the compliance status of a union are not litigable in the proceeding (R. 516a, 517a, 528a).

It is true that the Board, where it "has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of Section 9(h) of the Act," does occasionally conduct an investigation to determine whether such evasion exists. Section 102.13 (b) (3), N.L.R.B. Rules and Regulations (see Appendix, p. 79); *Compliance Status of Furniture Workers, Upholsterers, and Woodworkers Union, Local 576*, 107 N.L.R.B. 872 (1954). But again this does not involve a general investigation of functions and duties of labor leaders, for the test of evasion appears to be merely whether the union has amended its constitution since the enactment of Section

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of determining who are the officers of a union; that it is arbitrary and mechanical and frustrates the intent of Congress in enacting Section 9(h), which was to "*wholly eradicate and bar* from *leadership* in the American labor movement, *at each and every level*, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government."[8] (Emphasis supplied.) Respondent believes that a proper definition of "officer," and one which will have within itself the room to do the Congressional will of eliminat-

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9(h) by dropping a particular position from the list of union posts therein designated as offices (R. 531a). *Compliance Status of Furniture Workers, etc., supra*).

And the Board will investigate to determine what is the true constitutional list of officers where the union constitution is itself ambiguous. In *Compliance Status of Local No. 1150, U.E.W.*, 96 N.L.R.B. 1029 (1951), the Board resolved the ambiguity in regard to certain union posts, referred to in the constitution of the local but not specifically entitled "officers", by comparing that constitution with the parent international union's constitution which provided that the locals should have certain offices, including the particular positions in question. The Board decided, therefore, that these posts in the local were to be considered offices for the purposes of Section 9 (h). It is to be noted that the Board did not, however, consider extrinsic evidence concerning the local union leaders' duties and functions.

The Board also tells us that it "encourages parties to a proceeding to bring to its attention all matters affecting the union's compliance status," that it will entertain motions regarding the compliance status of unions, and may as a result "conduct extensive administrative investigations and hearings for the purpose of determining fraudulent omissions" from a union's constitutional list of offices (pp. 18, 40, 41, 61). But, as the Board plainly says, it is concerned with evasion of the "constitutional" test (Petitioner's brief, pp. 41, 61), as where a union office has been dropped from the constitution following the enactment of Section 9(h). The Board does not, however, encourage parties to bring up evidence concerning the functions and duties of a labor leader whose position is not and never has been designated an office in the union constitution, as this case bears witness.

[8] *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U. S. 321, 325 (1951).

cuted by each officer of any national or international labor organization of which the charging union was an affiliate or constituent unit.

The Board held that the C.I.O. was not a "national or international labor organization" as the words were used in the Act, and hence that the C.I.O. officers were not required to file affidavits before the Board could issue the complaint. This the question in the *Highland Park* case related to the Board's legal construction of the meaning of the term "national or international labor organization." In this case, the question is the legal construction of the term "officers" in Section 9(h) and the Board's determination of compliance founded upon its legal interpretation of that term.

The Board argued in the *Highland Park* case (as it does here), that its administrative determination that the union was in compliance (which determination was based on the Board's view of the proper construction of Section 9(h)) was not subject to challenge by the employer in an unfair labor practice proceeding.

But this Court held that the Board had wrongly interpreted the statute, and that the employer was correct in maintaining that the C. I. O. was a "national or international labor organization," whose officers must file affidavits. It also specifically rejected the Board's contention that its administrative determination of compliance in such a situation could not be contested. The opinion held that when the Board's determination of compliance involved an issue of law, as distinguished from questions of fact, the employer was not precluded from challenging in an unfair labor prac-

ing the threat of Communist leadership of the unions, must be broader than the Board's "constitutional" test or definition.

"Officers," we submit, must be defined so as to include all union executives whose duties, responsibilities, and influence in unions measure up to those of an officer as that term is ordinarily understood. This so-called "functional" test for determining officership would include all those union executives, such as Regional Director Taylor, whose positions of leadership and great responsibility give them a real opportunity to control and manipulate a sizeable segment of the labor movement.

Under the Board's "constitutional" test the distinction between officers and non-officers rests upon the arbitrary basis of whether or not the position of the union leader in question happens to be designated an officer in the union constitution. The process of decision of the question of officership under the Board's "constitutional" test thus becomes a mere mechanical checking of the list of officers contained in a union's constitution without any investigation or consideration of the facts as to union executives' duties and functions to determine whether other executive posts in the union beside those designated as offices in the union constitution reach official stature. Respondent's "functional" definition of "officers" would, on the other hand, require the Board, in determining who are the officers of the union, to consider the facts as to the commanding power, prestige and influence exercised within the union and upon labor management relations by important union executives, such as Regional Director Tay-

lor, whose posts are not denominated officers in the union constitution. In short, Respondent's "functional" test would take account of the realities of leadership in unions, which, Respondent believes, was what Congress intended.

Believing, as the Respondent does, that the Board's "constitutional" test for defining the term "officers" is too narrow and arbitrary and frustrates the intent of Congress to eradicate the threat of Communist domination at each and every level of the American labor movement, the Respondent submits that it had the right to raise a challenge to that definition when it was applied against Respondent in the unfair labor practice proceeding and before the Court of Appeals in proceedings to enforce the Board's ruling. It is Respondent's position that it has a right to be heard on its view of the proper definition of "officers," since the scope of the affidavit-filing requirement and, in turn, the very jurisdiction of the Board, depends upon the proper interpretation of this term. Respondent was familiar with the Board's "constitutional" test for defining "officers."[9] Nevertheless it raised the question of compliance with Section 9(h) in the unfair labor practice proceeding in order that, if the Board adhered to its

[9] The Board's "constitutional" test as set forth in its Rules and Regulations (Appendix, p. 79) is, and was at the time of the hearing, of course, a matter of public record. Furthermore, the Respondent had had previous personal experience with the Board's position. The Respondent had urged in an earlier representation proceeding between the Respondent and the same charging union herein, Case No. 9-RC-1235, 96 N.L.R.B. No. 209, that the Union was not in compliance. As the Trial Examiner noted in this case, the Board took the same view in regard to the failure of Mr. Taylor to file an affidavit in the representation proceeding as it does in this case. (R. 5189.)

Thus it appears that the Courts have deferred to the Board's ruling of non-litigability of the compliance status of the union in an unfair labor practice proceeding, but only where the Board's determination of compliance is challenged in respect of issues of fact involved in the Board's determination of compliance. The courts, however, have drawn the line where an employer seeks to question the legal interpretation of Section 9(h) which the Board applies in deciding labor cases, and have held that the employer may not be denied his right to be heard upon the proper construction of Section 9(h). Respondent respectfully submits, therefore, under the foregoing authorities, the Board cannot define the term "officers" as it appears in Section 9(h), and then foreclose all right of judicial review of its definition by invoking the rule that compliance questions are a matter for its exclusive *ex parte* determination.

B. THE LEGISLATIVE HISTORY OF SECTION 9(h) DOES NOT SUPPORT THE BOARD'S VIEW THAT ITS CONSTRUCTION OF SECTION 9(h) SHOULD NOT BE SUBJECT TO CHALLENGE BY A PARTY AGAINST WHOM SUCH CONSTRUCTION IS APPLIED IN AN UNFAIR LABOR PRACTICE PROCEEDING.

The Board contends that the legislative history of Section 9(h) indicates a Congressional intent that a party to an unfair labor practice proceeding should not be permitted to litigate the compliance status of unions in such proceedings, in order to expedite the resolution of other issues. To support this theory, the Board relies on certain statements made by Senator Taft while Section 9(h) was in the process of passage. Respond-

gnt believes that statements from the legislative history of Section 9(h) do not support the Board's conclusion, since such remarks were not uttered in reference to the problem of this case, namely, whether a party to an unfair labor practice proceeding may question the definition of "officers" which the Board applied in deciding that the unions involved were in compliance. Rather Respondent finds in the legislative history of Section 9(h) a total absence of any expression of intent by Congress to deprive parties in labor cases of the right to challenge the construction of the statute invoked against them in the adjudication of their rights and duties.

Senator Taft's remarks, which the Board cites (Petitioner's Brief, pp. 21-23),[17] were directed to explaining a change made in the mechanics of Section 9(h) while that provision was in process of passage.

In earlier versions of Section 9(h) it was provided that a union could not be certified as a representative of employees if its officers were Communists. While the anti-Communist provision of the statute stood in this form, the question of whether particular union officers were or were not in fact Communists would have had to be litigated in each case coming before the Board. Senator Taft explained that it was thought that the determination of whether a man was a Communist or not would unduly delay the hearing. Hence the wording of the statute was changed so that it simply

[17] The statements of Senator Taft which the Board quotes appear at 93 Cong. Rec. 3814, 3847, 4022, and also in the *Digest of the History of the Labor Management Relations Act, 1947*, Govt. Print. Off. 1948, pp. 1542, 1547, 1625 (hereinafter cited as *Leg. Hist.*).

provided that the officers of the union must file non-Communist affidavits before the Board could proceed to dispose of a labor case. In substance the test for determining whether the union had qualified itself to ask for relief came to be whether its officers had filed non-Communist affidavits, rather than whether the officers were in fact Communists. No doubt it was thought that the filing requirement would result in "smoking out" Communist labor leaders, without making the labor hearing a forum to decide a person's political convictions.

Senator Taft, however, was not expressing a general view as to how unfair labor practice proceedings were to be conducted. Certainly he did not say that the Board's definition of "officers", upon the basis of which the Board made a decision on the compliance status of a union, should not be subject to challenge by an employer in an unfair labor practice proceeding in order to save time in the administration of the act.

The Board also points (Petitioner's Brief, p. 24) to a portion of the Report to the Joint Congressional Committee on Labor-Management Relations. The comment of this Joint Congressional Committee, reporting to Congress in the year following the passage of Section 9(h), does not touch the precise issue herein involved. The Report stated:

> "Board hearings must be confined to evidence going to the merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargain representatives." (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45.)

the C.I.O. affiliates and in labor management affairs."[12]

The fundamental issue, therefore, may be stated in the following way, namely, whether the facts as to a union executive's functions and duties are legally relevant and necessary to deciding the question of officership. Under the Board's "constitutional" test they are irrelevant, but Respondent maintains that they are relevant. The answer lies in the view that is taken as to the proper definition of "officers."

Respondent thus seeks to challenge the Board's determination that the unions herein were in compliance with Section 9(h) in respect to a fundamental question of law—the definition of "officers" which the Board applied in making its determination of compliance. The Respondent contends that the Board may not rightfully shield its "constitutional" test, which the Respondent contends is too narrow, from all judicial scrutiny by simply stating the generality that the determination of questions of the compliance status of unions are within its exclusive administrative province and are not litigable in unfair labor practice proceedings. Such a rule may be applicable where a party to a labor case hearing seeks only to challenge the Board's determination of issues of fact in respect to a union's compliance status. It does not govern, Respondent con-

[12]The actual words of the Board were: "Moreover, had the Respondent . . . established . . . what it had offered to prove at the hearing herein, we are satisfied, and find, that under the Board's present 'constitutional' test, such proof would fall short of substantiating the Respondent's contention that Taylor was an officer of the C.I.O." R. 53a.

But the Committee only had in mind that certain questions of fact in regard to the compliance of unions with Section 9(h) should not be litigated in the unfair labor practice proceeding. This is made clear by another statement immediately preceding the above-quoted sentence on page 45 of the report:

> "If the parties to Board hearings are permitted to question the veracity of the affidavit or the fact to it having been filed, the records will be hopelessly overburdened with such proof."

This report has been used to support the rule of non-litigability of issues of fact administratively determined by the Board in regard to a union's compliance with Section 9(h). *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (6th Cir. 1954).[18] But, as the decision in this case by the Court of Appeals indicates, the courts have not understood this report to suggest that the Respondent may not challenge the construction of law upon which the Board's determination of compliance is founded.

Respondent has been unable to find, and the Board does not cite, any statement of Congressional intent that the need for expediting labor cases is so great that the Board could construe the definition of "officers" upon which its very jurisdiction of the case depends without that construction being subject to judicial review. In the absence of clear evidence that Congress

[18] See also p. 22, fn. 15, *supra*, and the statement of the Court of Appeals Seventh Circuit, in the *Goodman Manufacturing Co.* v. *National Labor Relations Board*: "It appears that courts ought not inquire into the factual or merely formal aspects [of a union's compliance with Section 9(h)]. —— F. 2d at ——.

intended that the determination of legal questions in regard to compliancy status of the union, as well as questions of fact, should be entrusted exclusively to the Board, it must be assumed that Congress did not mean to deprive parties to labor cases of all right to contest the interpretation of law applied in the case. For the usual rule is that "the order of an administrative tribunal may be set aside for an error of law, substantive or procedural." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 74 (1936) (Mr. Justice Brandeis' concurring opinion). And that rule is plainly applicable to cases arising under Section 9(h). *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326 (1951).[19]

[19] The Board also argues that Section 9(f) and (g) of the National Labor Relations Act (29 U. S. C. Section 159 (f), (g)) are parallel provisions to Section 9(h) and that permitting litigation by a party to a labor case in respect to Section 9(h) would necessarily result in similar litigation under Sections 9(f) and (g). (Appendix, pp. 75-77). Sections 9 (f) and (g) require a union to file with the Secretary of Labor certain financial and other data concerning the union before the Board may proceed to hear and decide a labor practice charge or a representation issue raised by the union. The Board urges that the Secretary of Labor would be required to defend his determinations as to such matters as the "form and content of the information to be filed, and the adequacy, accuracy and completeness of [the] information" (Petitioner's Brief, p. 29) under the rule in respect to Section 9(h) contended for by the Respondent. But all these questions are questions of fact in regard to the determination of compliance of a union with Section 9(f) and (g). The limited right of litigation, restricted only to the issue of the proper construction of Section 9(h), for which Respondents here contended, would not, if extended to Sections 9(f) and (g), permit any party to an unfair labor practice proceeding to dispute such factual determinations of the Secretary of Labor in respect to compliance with Sections 9(f) and (g).

Of course, it is possible that a respondent might seek to question the legal construction of Section 9(f) or (g) applied administratively in determining compliance with Section 9(f) or (g) under

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C. EXPEDITION IN THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT IS NOT SACRIFICED BY THE RULE CONTENDED FOR BY THE RESPONDENT.

The Board urges that litigation of the question of the compliance of the unions with Section 9(h) in the manner here contended for would seriously impede the resolution of the unfair labor practice charges here in issue (Petitioner's brief, pp. 30-39). The Board points out that, in order for Respondent to substantiate its view that Regional Director Taylor is to be considered an officer of the C.I.O. in spite of the fact that his position is not denominated as such in the C.I.O. constitution, Respondent would have had to introduce evidence as to the role Mr. Taylor plays in the internal affairs of the C.I.O. and its affiliates and also evidence as to his functions in labor-management relations" (Petitioner's brief, p. 32). Further, the Board suggests the

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the rule contended for by the Respondent. The most obvious question that would be likely to arise is whether a particular union organization is a "labor organization" or a "national or international labor organization" within the meaning of Sections 9(f) or (g) and hence is brought under the filing requirements of Sections 9(f) and (g). If Sections 9(f) and (g) are parallel with Section 9(h), then it would seem that the *Highland Park* case, which upheld the right of a party to a labor case to challenge the Board's construction of the identical statutory term appearing in Section 9(h) (*supra*, pp. 26-29), conclusively establishes the right of a party to do the same thing in respect to Sections 9(f) and (g).

However, it is appropriate to note that this Court has not clearly ruled that the three subsections are parallel, this Court having only expressed in dictum that it "would seem that the construction of Section 9(h) would lead to a like construction of Sections 9(f) and (g)." *National Labor Relations Board* v. *Denver*, 344 U. S. 375, 383 (1953). And indeed the Board itself appears not to regard that case as conclusive of the question, since it has not always treated 9(f) and (g) as parallel with (h). See *Compliance Status of Plaster Tenders, Construction, General and Shopyard Laborers Local Union No. 802*, 111 N.L.R.B. 742 (1955).

Inc. case does not here arise. In *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (7th Cir. 1954), the issue was whether one Sheehan, a union representative, who had not filed an affidavit, was an officer or a *de facto* officer of the union. The Court noted that the Board had found upon an independent investigation that Sheehan was not an officer, either *de facto* or otherwise; and the Court held that the employer could not challenge this administrative determination of a *question of fact* in an unfair labor practice proceeding. No issue of the proper definition of "officer" in Section 9(h) was before the Court. The essential difference between the *American Rubber Products* case and the instant case is that Respondent here does challenge the Board's determination of law that Regional Director Taylor could not be an officer required to file an affidavit because his post is not *entitled* an office in the C.I.O. constitution.

Similarly in *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (1954), the Court of Appeals for the Sixth Circuit also indicated approval of the view that the Board could properly determine the facts as to the compliance status of a union without its conclusions being subject to litigation. But the court nowhere expressed the opinion that the definition of "officers" applied by the Board in making its determination of compliance should not be a litigable issue.[15] And in the case of

[15] It is clear that the Sixth Circuit, in adopting the view that the Board's determination of the compliance status of a union was

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had issued its complaint in regard to such charges, but before the Board issued its order deciding the case, was sufficiently timely to validate the Board's proceeding with and deciding the case. The Board urged that the subsequent compliance with Section 9(h) "cured any defect which might originally have inhered in the Union's capacity to invoke the Board's aid", or, in other words, that as a matter of law the ultimate compliance by the C.I.O. satisfied Section 9(h) requirements. In holding that the compliance of the C.I.O. officers with Section 9(h) was not sufficiently timely and that therefore the Board should not have undertaken to decide the case, the court specifically held that the employer has standing to raise the issue of compliance in such circumstances. 189 F. 2d at 733.

This Court's decision in *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322 (1951), is an authoritative recognition of the right of the employer to challenge the Board's determination of the compliance status of the union when the question of compliance involves the legal construction of Section 9(h). In that case the Textile Workers Union charged the employer with an unfair labor practice; and in the proceeding thereby initiated, it developed that officers of the C.I.O., with which the charging union was affiliated, had not filed the non-Communist affidavits. The employer, in raising the compliance issue, relied on the language of the Act which provided that no complaint could be issued by the Board pursuant to a charge made by a labor organization unless there were on file with the Board non-Communist affidavits exe-

tice proceeding the compliance status of the union. Mr. Justice Jackson stated:

> "We think the [Board's] contention [that its administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding] is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U. S. at 325, 326.

We respectfully submit that the instant case is indistinguishable from the *Highland Park* decision. Both cases present the same issue, namely, whether the employer may challenge the Board's determination that the union was in compliance on a point of law, namely, the construction of certain terms which appear in Section 9(h). In neither case did any dispute over the facts arise. It was not denied in the *Highland Park* decision that the C.I.O. officers had not filed affidavits; nor here that Regional Director Taylor had not filed one. In both cases the simple issues related to (a) whether the statute should be construed so that the persons involved would be brought within the affidavit-filing requirement of the Act, and (b) whether an employer could question the Board's ruling that the statute did not require such persons to file affidavits. The *Highland Park* decision ruled in favor of the employer on both issues and, we submit, its holding is controlling here.

The Board, in seeking to distinguish the *Highland Park* decision from the case presented here (Petitioner's Brief, pp. 45-48), mistakenly argues that a question of "fact of compliance" by the C.I.O. is present here and relies on the following language of the *Highland Park* opinion:

> "If there were a dispute as to whether the C.I.O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact." 341 U. S. at 325.

But this language does not help the Board. Mr. Justice Jackson here was giving two examples of questions of the "fact of compliance" which he suggested might be held to be a matter for the Board's exclusive determination: (1) a dispute whether affidavits had or had not been filed, or (2) a dispute whether the affidavits on file were sufficient in form and content.

Respondent is unable to see that anything like the problems indicated in these examples is involved here. No one denies that Mr. Taylor had not filed an affidavit. The question is whether the statute makes it necessary for one in his position to file an affidavit. The Respondent does not urge that any of the C.I.O. affidavits which are on file are deficient in form or are otherwise unsatisfactory, but that under a proper definition of the term, Taylor is to be considered an "officer" who must file an affidavit.

same process of time-consuming investigation could be repeated in every labor case in which the compliance status of a union is challenged in the manner done so by the Respondent here (Petitioner's brief, pp. 31, 32-33, 35). And the conclusion sought to be drawn from these arguments is that the resulting delay and impediment to the disposition of the merits of labor cases is so great that the practice should not be held by this Court to be required.

Respondent's answer is (1) that hearing the Respondent's proof to support its view that Mr. Taylor is an officer would not actually have materially lengthened the hearing of this case; (2) that expending the limited amount of time necessary to hear such evidence is justified because this evidence has a direct bearing on the question of the correctness of the Board's "constitutional" test; and (3) that in any case the alleged delay involved in hearing evidence as to labor leaders' functions and duties in future labor case proceedings could be totally avoided if the Board adopted a "functional" test as the basis for its administrative determination of compliance questions.

(1) Actually the Trial Examiner would not have appreciably slowed down the determination of this case by allowing the Respondent to present its evidence on the important and influential role which Regional Director Taylor plays in labor affairs in Kentucky. Nearly three years elapsed from the filing of charges to the entry of the Board's order. The hearing itself, even without the introduction of the Respondent's evi-

dence, continued for a month.[2] In view of this we submit that a few more hours could have been spared in order to consider Taylor's duties and responsibilities and to determine from them whether or not Taylor's role with the C.I.O. rose to the dignity of that of an officer.

(2) The Respondent's offer of proof in regard to Regional Director Taylor's duties and functions directly challenges the Board's construction of Section 9(h) whereby the term "officer" is limited to those holding constitutionally designated officers. If the Respondent could substantiate its contention that the facts would show that Taylor's position measures up to that of an office, as Congress understood that term, Respondent would succeed in establishing its theory that the "constitutional" test cannot be the exclusive basis for determining officership. Hence, allowing the Respondent in this case to present its evidence would serve as the means of determining whether the Board's "constitutional" test is the proper basis for determining officer status. Surely Congress did not mean that the Board should frustrate its anti-Communist labor policy by applying an incorrect definition of "officers." Yet this anomalous result may occur if the Respondent is not permitted to challenge the Board's "constitutional" test by demonstrating that one who is plainly outside the "constitutional" definition of "officers" is nevertheless clearly an "officer" within the common meaning of the term, which is believed to be the meaning the Congress intended.

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[2] R. 4a-5a.

The policy against delaying labor hearings may well outweigh the desirability of a judicial review the correctness or reasonableness of the Board's factual conclusions, such as whether or not certain union leaders have actually filed affidavits or whether such affidavits are satisfactory in form and content or are veracious. Accord: *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.* (*supra*, pp. 21, 22); *National Labor Relations Board* v. *Sharples Chemicals, Inc.* (*supra*, pp. 22, 23); *American Rubber Products* v. *National Labor Relations Board* (*supra*, p. 22). But here Respondent's offer of evidence does not purport to controvert any contrary factual conclusions drawn by the Board in making its *ex parte* administrative determination of union compliance with Section 9 (h): Rather it was directed to an issue which the Board had, under its "constitutional" test, no occasion to consider, namely, whether Regional Director Taylor's duties and functions are such that he is to be considered an "officer" within the meaning of Section 9(h). Hence the Respondent's evidence has a direct bearing on the correctness of the Board's construction of the term "officer" in Section 9(h). Respondent, therefore, submits that the importance of hearing the evidence necessary to support its theory that the "constitutional" test cannot be the sole criterion for determining officership prevails over the need to expedite labor hearings. *Goodman Mfg. Co.* v. *National Labor Relations Board* (*supra*, p. 24); Accord: *National Labor Relations Board* v. *Highland Park Mfg. Co.* (*supra*, pp. 26-29).

(3) Finally the Respondent believes that the Board could consistently with the proposed "functional" test avoid all litigation of the question of union officership in labor case proceedings by changing its method of determining compliance questions. In other words, Respondent contends that the blame for whatever delay which would have resulted from hearing Respondent's proof lies in the Board's present practice of deciding questions of compliance under the "constitutional" test.

Respondent's basic objection to the Board's administrative process of decision by the "constitutional" test is that the Board does not investigate the duties and functions of union executive in determining officership, but rather decides the issue solely on the basis of the list of officers contained in the union constitution. Respondent believes that the determination of the officers of a union must properly be based on a consideration of the facts as to union leaders' position, influence, and power in union affairs and in labor-management relations (*supra*, pp. 14; 15; *infra*, p. 47). Thus it becomes necessary under the Respondent's "functional" test that the Board at some point should investigate the duties and functions of the leading executives of a union, even though they do not happen to be designated "officers" in the union constitution.

But Respondent does not, however, take the position that this consideration of the facts as to the functions and duties of a union executive must necessarily take place in the hearing of the labor case itself. Rather there seems to be no reason why the Board could not

make the necessary investigation of the facts when it undertakes its *ex parte* administrative determination of the compliance of a charging union preliminary to issuing the complaint initiating the hearing. If the Board did make such an investigation of the facts and then drew the conclusion that certain union executives measured up to the concept of officers and that the rest of the union functionaries do not, these findings would in Respondent's view be conclusive in the labor case hearing itself.[21] For the Board's determination that a particular union functionary is or is not an officer would be a matter of fact.[21] It, therefore, follows that such factual determinations would not be subject to litigation under the authority of the *Sharples Chemicals* case and of the *Vulcan Furniture* case (*supra*, pp. 21-23).[22]

[21]The Respondent stated in its discussion of the issues (*supra*, p. 17) that an entirely different case would be presented if the issue here were the inferences which the Board had drawn from an investigation of the facts as to Mr. Taylor's functions and duties. The Respondent would not urge that it has the right to challenge the Board's conclusion of compliance if the Board had made the following finding:

> "Upon prior investigation of the duties and functions exercised by Regional Director Taylor, we have concluded that in fact his power and influence in union affairs is too insignificant for him to be considered an officer within the meaning of Section 9(h)."

[22]Of course the party to an unfair labor practice proceeding would have the right, under Respondent's view to challenge the Board's construction of Section 9(h) in respect to the definition of "officers" if for example, the Board, while purporting to apply a "functional" test in actuality utterly failed to do so. Also it would be open for an employer to challenge the Board's factual conclusions as to a union's compliance status if it appeared that there were no "ostensible compliance". *National Labor Relations Board* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, 371, 372 (5th Cir. 1954); *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (5th Cir. 1951).

It is clear, therefore, that under Respondent's view the unfair labor hearing need not in the future be the forum for an investigation of the facts relating to union executives' positions as officers. All that would be needed is for the Board under a "functional" test or approach, somewhere, sometime, to make a realistic investigation of the duties and functions of executives of a union, and, upon the basis of such investigation, make its determination of officership. The essential thing is that the investigation be made, not where it is made nor whether the employer in a labor case be a participant in it. If the Board really believes that hearing evidence like that offered by Respondent before the trial examiner would significantly impede the resolution of the unfair labor practice issue in future cases, the Board has within its power[23] the means to make the necessary investigation of the facts in its *ex parte* administrative determination of compliance.[24]

[23] It has been held that the Board has wide discretion in shaping its procedure to administer the Act. *Wallace Corp. v. N.L.R.B.*, 323 U. S. 248, 253 (1944); accord: *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143 (1940).

[24] Of course there are probably other ways in which the Board could decide the question of union officership on the basis of a consideration of the facts as to union leaders' duties and functions and yet avoid hearing such facts in the representation or unfair labor practice proceeding itself. The Board's present practice of providing collateral hearings on issues raised by a party to a labor case in regard to a union's compliance status suggests another possible solution of the problem. The Board pointed out in its Decision and Order in this case (R. 529a) that it is the Board's practice to conduct a separate and collateral hearing in which issues as to the compliance status of a union involved in a labor case before it can be heard and determined, if need for such a hearing is shown. It seems that this collateral proceeding, which is apart from the hearing of the other issues raised in a labor case, could be made a

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It is true that in this case the Respondent sought to offer factual evidence in regard to Regional Director Taylor's duties and functions in the unfair labor prac-

forum in which the facts as to a labor leader's power and influence in labor affairs could be aired and a decision made as to whether such leader's position makes him an officer.

"And it might be possible to combine advantageously both an *ex parte* administrative investigation of the position, power, and influence of union leaders with the practice of providing collateral hearings on compliance questions. The Board might find from experience in its *ex parte* administrative investigations of labor leaders' functions and duties that the characteristics of leadership and power touching official stature are usually to be found only in certain union posts, and not in others. Thus the Board might discover that in a labor federation or an international union certain enumerated union executives, including, for example, regional directors, do exercise the duties and functions associated with officership, but that union stewards or shop-committeemen in the locals ordinarily do not. And the Board might decide that in making its administrative investigation of the union executives of a particular union it would only investigate those posts which it reasonably believes are likely to measure up to offices. It could then permit a party to a labor case, who tenders substantial evidence that another labor functionary outside the group of leaders administratively investigated by the Board nevertheless wields the power and influence of an officer, to be heard on the subject in a collateral hearing.

Yet it is clear that the Board would have to abandon the present "constitutional" test as the touchstone of decision if such collateral proceedings are to serve any real purpose in a case such as this one. Respondent did not at the hearing of this case petition the Board for such a hearing (R. 530a, Petitioner's Brief, pp. 6, 7). Clearly it would have been futile and time consuming for the Respondent to have attempted to induce the Board to hold a collateral hearing in this case on the question of whether Regional Director Taylor's executive duties and powers were such that he is properly to be considered an officer. The Board clearly stated that it would have decided in such a collateral hearing that Taylor was not an officer, because his position is not denominated as such in the C.I.O. constitution, regardless of what the Respondent could have shown as to his power and influence in labor affairs. The Board said that "had the Respondent proceeded by an appropriate motion to the Board and that had the Respondent established in a collateral hearing what it had offered to prove at the hearing herein, we are satisfied and find that under the Board's present 'constitutional' test such proof would fall short of substantiating the Respondent's contention that Taylor was an officer of the C.I.O." (R. 530a).

tice proceedings. But the Board had not made any investigation of Taylor's duties and functions. Yet the Respondent was of the opinion that the facts as to his position would demonstrate him to be an officer within a proper definition of the term "officer." Believing as it did that these facts as to Mr. Taylor's duties and functions were relevant to the question of Mr. Taylor's status in the union, and that the Board must take such facts into consideration in deciding whether he was an officer, Respondent could only hope to bring those facts to the Board's attention by offering proof in the hearing itself.[23]

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[23] The Board further urges that Congress was not in any way concerned in enacting Section 9(h) to confer any special rights or benefits on employers and that the interest of the employer is but a collateral one (Petitioner's Brief, pp. 44, 45). The implication from this is that the Respondent should, therefore, not be permitted to challenge the Board's determination of compliance with Section 9(h) in the manner here sought. Respondent submits that this argument overlooks the important rôle which the Respondent plays in the administration of Section 9(h).

Even though it may be that the fundamental purpose of Section 9(h) was, as the Board states (Petitioner's Brief, p. 44), to protect the *public interest* from Communist-inspired political strikes (*cf. Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 192-193 (1941)), nevertheless it is important to recognize the standing of the Respondent to challenge the construction of Section 9(h) because it is "the only person who [has] a sufficient interest to bring to the attention of the [Board or] the appellate court errors of law," in the construction and application of the term "officer" in Section 9(h). *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 477 (1940).

II.

Congress Intended the Term "Officer", as Used in Section 9(h) to be Construed so as to Connote Those Union Leaders Who Enjoy the Influence and Power Ordinarily Attributable to an Officer.

A. FINDING AND APPLYING THE CORRECT DEFINITION OF SECTION 9(h) IS A MATTER OF THE GREATEST IMPORTANCE IN VIEW OF THE STRONG ANTI-COMMUNIST LABOR POLICY EMBODIED IN SECTION 9(h).

The Petitioner's brief (p. 30) contains the statement that litigation of the question of a union's compliance status would create "opportunities for delay and would thus, substantially impair the Board's ability to perform *its principal statutory* functions under the Act." It seems clear from this reference to "principal statutory functions" that the Board regards the determination of the compliance status of a union, and hence whether the union has properly qualified itself to ask the Board for relief, of little importance as compared to its task of deciding representation issues and unfair labor practice charges. The Respondent hotly contests this view.[26] It is of course true that historically the

[26] In making the statement concerning its "principal statutory functions" (Petitioner's brief, p. 30), the Board apparently relies on a reference in the March, 1948, Report of the Joint Congressional Committee on Labor-Management Relations to the Board's "real function" in hearing labor cases (Petitioner's brief, pp. 24, 33). The quoted portion of the Committee Report (appearing on page 24 of Petitioner's brief) includes the following sentences:

> "If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to its having been filed, records will be hopelessly over-burdened with such proof. Board hearings must be confined to evidence going into

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Board was established for the express purpose of handling issues between labor and management concerning employee representation and the permissible labor practices to be employed between the two. And in the early days of its existence the Board was not obliged by law to concern itself with Communists in labor unions. However, the introduction of Section 9(h) into the National Labor Relations Act in 1947 reflected the development of a new and additional labor policy on the part of Congress. That policy was that the threat of Communist infiltration into the American labor movement should be checked.[27]

merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives." (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45).

Respondent believes that the Committee meant to indicate that litigation of such factual issues as "the veracity of the affidavit or the fact as to it having been filed" should not be allowed to interfere with the "real function" of a labor proceeding, *viz.*, to decide representation questions and unfair practice charges. And Respondent does not contend that the hearing should be a forum for the litigation of such issues. But Respondent does not believe that the Committee meant to suggest that it was not an important function of the Board to determine the officership of a union and hence whether it could according to Section 9(h) act in a labor matter at such a union's request. In light of the clear command of Section 9(h) that the Board should not act on behalf of a non-complying union, it is hard to see how Congress could have regarded the construction of Section 9(h), which is made the basis of determining compliance, as a matter of trivial concern.

[27] The legislative history of Section 9(h) is filled with the expressions of the members of Congress who saw a grave danger in Communist infiltration into the unions and Representative Bell in discussing the proposal which became the present Section 9(h) wanted Congress to protect the country "against the impending danger of having Communists in control of our great American labor organizations." 93 Cong. Rec. 3626, *Leg. His.*, 785. Congressman Barden sought a provision which would put "every safeguard

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As the language in Section 9(h) indicates, Congress particularly intended that a Communist dominated union should not have the aid and benefit of the Board's offices and the use of its processes in questions concerning representation of employees and unfair labor practices. Congress devised the non-Communist affidavit filing requirement as the method of excluding Communist-led unions from the benefits of the Act, and so provided in Section 9(h) that the Board could not act where the officers of the union involved, and even of its affiliated unions, had not filed the required affidavits. As the whole anti-Communist policy of Congress depends upon the enforcement of the affidavit-filing requirement, and as this, in turn, directly involves those who are to be considered "officers", Respondent can only conclude that finding and applying the correct definition of "officers" is of the highest importance.

If the true view were that Congress regarded the affidavit-filing requirement as a relatively trivial matter; the Board's mechanical checking of union officer affidavits against the list of offices enumerated in the union constitution might be a justifiable mode of determining the officership of a union, and hence the

possible around the membership of labor organizations and . . . save them from the troubles and grief that would come from this type [i. e., Communist] of leadership." 93 Cong. Rec. 3627, *Leg. Hist.*, 786. Representative Hallock stated that Section 9(h) was to deal with the matter of "Communist-dominated unions." 93 Cong. Rec. 6382, *Leg. Hist.*, 880. Also this Court has authoritatively recognized the danger of Communist activities in the American labor movement which Congress saw and sought to prevent. Chief Justice Vinson discussed the threat of Communist inspired political strikes which induced Congress to pass Section 9(h) in *American Communications Ass'n v. Douds*, 339 U. S. 382, 387-389 (1950), where this Court upheld the constitutionality of Section 9(h).

union's compliance status. But the whole anti-Communist policy of Congress in Section 9(h) is made to turn on the proper determination of officership in a union. Respondent, therefore, believes that such a determination of who are officers must be made on the basis of a consideration of the functions, duties, powers, and responsibilities of union leaders in executive posts, irrespective of how the union has labelled their positions. This so-called "functional" test for determining who are to be considered "officers" for the purposes of Section 9(h) necessarily involves realistic investigation and evaluation of the facts as to positions which particular union leaders hold. This consideration of the facts, as Respondent has pointed out (*supra*, pp. 39-43) might be made by an *ex parte* administrative investigation. Or, if the Board prefers, it may let a party to a labor case initiate the consideration by attempting to prove in the hearing that a particular union executive holds so important a position of power that he must be considered an officer. In any case the application of a "functional" approach, which calls for an investigation of the facts as to the role played by a union leader in question, is necessary to carry out the Congressional policy that Communist labor executives be removed from positions of power at "each and every level" of the American labor movement. *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. at 325.[28]

[28] At the very least it is necessary to have an investigation of the duties and functions of those labor executives who hold important and influential posts in the union, but whose positions are

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B. A "FUNCTIONAL" TEST, SUCH AS IS SUGGESTED BY THE RESPONDENT IS NECESSARY TO EFFECTUATE THE CONGRESSIONAL POLICY OF ELIMINATING COMMUNISTS FROM IMPORTANT POSTS OF LEADERSHIP IN LABOR UNIONS.

Respondent contends that the Board's definition of the term "officer" is arbitrary and wholly inadequate to serve the legislative policy underlying Section 9(h). Rather, it is submitted, the term "officer" should be held to include all persons occupying posts of leadership in unions whose duties, responsibilities and influence in the union measure up to those of an officer as that term is ordinarily understood. Such a definition, which looks to the functions which executives of labor unions exercise rather than the labels by which their positions are designated, is consistent with the intention of Congress to avoid Communist domination of labor union leadership. Respondent further asserts that if the facts pertaining to the important position which Regional Director Taylor holds in union affairs in Kentucky and his influence in labor-management relations there were shown, it would be clear that he holds a position which would plainly come within the category of "officers" under the "functional" test.

The records of the discussions of members of Congress, while Section 9(h) was in the process of passage, plainly indicate that the term "officer" was not there

not denominated "offices" in the union constitution. It may be, however, that the Board need not investigate the duties and functions of the constitutionally-designated officers. The Board might perhaps find that the holders of such positions so universally exercise commanding authority that it is reasonable to assume that they are to be presumed to be "officers" within the meaning of Section 9(h).

understood in any narrow or technical sense. Rather the keynote was that Section 9(h) was aimed at Communist "leadership"[90] and was to prevent Communist "domination" in unions.[91] Congressmen, in referring to the persons to whom Section 9(h) would apply, used the term "leader" either alone or interchangeably with "officer."[92] Representative Bell stated that "Communists have gotten into positions of authority and control" and he sought to protect "against the impending danger of having Communists in control of our great American labor organizations."[93] Congressman Halleck spoke of what is now Section 9(h) as a provision seeking to deal with the matter of "Communist domination and leadership in unions."[94] So far as Respondent has been able to determine, there is not one instance in which any member of Congress expressly indicated that the term of "officer" was to be defined by reference to a union's constitution, nor even hint of as much. Quite to the contrary, the emphasis was on "leadership" in unions and on union leaders in "positions of authority and control." Surely the qualities of leadership such as power, prestige and influence in union affairs and upon labor-management relations are not limited exclusively to the very top group of union officials likely to be designated in a union constitution.

This Court has held in the *Highland Park* case that Congress in enacting Section 9(h) meant to "wholly

[90] 93 Cong. Rec. 3627, 3628, 6382; *Leg. Hist.*, 786-788.
[91] 93 Cong. Rec. 6382; *Leg. Hist.*, 880.
[92] 93 Cong. Rec. 3627; *Leg. Hist.*, 785-787.
[93] 93 Cong. Rec. 3626; *Leg. Hist.*, 785.
[94] 93 Cong. Rec. 6382; *Leg. Hist.*, 880.

eradicate and bar from *leadership* in the American labor movement, *at each and every level*, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government." 341 U. S. at 325. (Emphasis added.) Certainly, then Congress meant to require affidavits of all union executives whose positions of leadership and influence give them a commanding place in the affairs of their unions and a key role in labor relations, regardless of whether those positions are called offices in the union constitutions. Surely, compliance with Section 9(h) by the relatively few people who occupy positions listed as offices in the union constitutions would fall short of reaching into each and every level of power and influence in the American labor movement.

Similarly, the Court of Appeals, Seventh Circuit, in *Goodman Mfg. Co. v. N. L. R. B.*, ——F. 2d—— (1955), has found that the Board's "constitutional" test is too restrictive and that certain union executives whose positions were not denominated as offices in its constitution are nevertheless to be considered "officers" within the meaning of Section 9(h). In that case, which is the only case involving the definition of "officers" which has reached a Court of Appeals beside this case, the question was whether trustees and district secretaries of the international union with which the charging union was affiliated were to be considered officers. If they were officers, then their admitted failure to file affidavits precluded the Board from hearing the alleged unfair labor practice charges. The Board had held, consistent with its "constitutional" test, that such

union leaders were not officers because their positions were not designated as offices in the union constitution. The Court of Appeals, however, rejected the Board's view that the determinative factor should be whether the position in question is labelled as an office in the union constitution. The Court ruled that the rank of officer was not to be confined "to one of the very few persons who hold the highest rank and perform executive functions at the highest level." And upon considering the duties and functions of the union executives in question, the Court concluded that they were to be considered officers and within the filing requirements of Section 9(h).* The Court stated:

> "According to the controlling interpretation of the purpose of 29 U. S. C. A., §159(h), contained in *American Communications Assn., C.I.O., et al. v. Douds*, 339 U. S. 382, the non-communist affidavit requirement is directed at persons 'when, as officers, they direct union activities' (page 407), or, as alternatively phrased in Mr. Justice Frankfurter's concurring statement, as persons 'who hold positions of official power' (page 418). The District Secretaries are in this category; therefore, we hold that they are officers." —— F. 2d ——.

*In this instance the international unions' constitution itself outlined the duties and functions of the district secretaries and the locations, although those posts were not specifically designated "officers." The Court indicated that the status of officership could not be denied to "those who hold positions of trust which, in the labor organization's own view, are of sufficient importance to be established by its constitution." However, the decision cannot be construed to mean that union leaders must be referred to in some way in the union constitution, even though not specifically as officers, before they can be considered officers. The question of officer status of union leaders whose positions are in no way referred to in the union constitution was not before the Court.

Of course, it is true that some degree of leadership may be found among union functionaries who could not possibly be considered officers by any stretch of the imagination. Indeed it must surely be the case that certain individuals, who are mere members of a union, by their native talents act in some sense as leaders of their fellows. But Congressmen, in discussing the kind of union functionaries to whom the proposed Section 9(h) should apply, did not mean to include this type of leadership by the use of the term "leaders" (*supra*, p. 49). It is not without significance that Representative Hobbs referred to the holders of "positions of powerful leadership."[35] It is precisely this sort of leadership which Respondent means to comprehend by its "functional" test.[36] Necessarily the characterization of a particular union executive as an officer or not presents a problem of the degree to which those qualities of leadership are present. In turn this requires an evalu-

[35] 93 Cong. Rec. 3628; *Leg. Hist.* 788.

[36] Respondent by no means contends that every occupant of the lower posts in a union's structure is to be considered an officer. It is hard to see how many functionaries on the lowest levels could be considered officers under any test. However, the Board seems to suggest that under the Respondent's view of the term, persons such as union coordinators, stewards, committeemen, and the like are necessarily to be considered officers (Petitioner's brief, p. 61). Respondent would suppose that people would not ordinarily regard stewards and committeemen in a union local as officers. An analyst of the structure of labor unions has stated:

> "Another group of local union representatives, not considered officers in the strictest sense, are the shop committeemen, or stewards. . . . [T]hey are generally without voice except as members, in the shaping of policy and administrative decisions in the local." Hardman and Neufold, *The House of Labor* (1951), p. 29; see also Peterson, *American Labor Unions* (1945), p. 80.

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ation of the facts as to functions and duties of the individual in question, and of the power and opportunity to command with which he is entrusted. Such evaluation is exactly the fundamental approach called for by the "functional" test. The "constitutional" test, on the other hand, cannot take into consideration the facts as to domination and leadership, because it is fundamentally rooted to a mechanical standard for deciding the question of officership, namely, whether or not the union post in question is designated an office in the union constitution.

The suggestion of the Board that the "functional" test is without objective criteria (Petitioner's brief, p. 64) is not an impressive argument. Of course, Re-

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Section 9(f)(6) requires unions to file with the Secretary of Labor a detailed statement concerning the procedure for election of "officers and stewards" of the union. In view of the foregoing it appears that Congress found it necessary to add the term "stewards" to bring those positions within the coverage of the subsection because it clearly felt that "stewards" were not officers. Similarly Congress inserted the term "agents" in addition to the term "officers" in Section 9(f) (2) and (3) which require that for a union to be in compliance with Section 9(f) it must file:

> (2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;
>
> (3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

It appears that the addition of "agents" and "stewards" in Section 9(f) was merely for the purpose of requiring certain information concerning union functionaries who are plainly not officers, but as to whom Congress deemed it advisable that such information be filed. The special denotation of these additional categories does not, however, as the Board seemingly suggests (Petitioner's brief, pp. 56-58), mean that the term officers in Section 9(h) was to be given in the very restrictive meaning of the "constitutional" test.

spondent cannot express a detailed formula of specific standards for the application of the "functional" test. For by its very nature the "functional" test depends on a consideration of the facts as to the incidence of leadership and power in a given union or federation. The Respondent does not pretend to sufficient knowledge and experience with the multitude of unions and labor organizations to predict in advance where the line is to be drawn as it relates to every union organization. For this task should be entrusted to the Board, as the agency commissioned by Congress to administer Section 9(h) (*National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130 (1944), and it is not to be supposed that the Board will be less able to work out adequate standards to guide the application of the term "officer" under the "functional" test, than in respect to other terms contained in the National Labor Relations Act, as for example the phrase "unit appropriate for the purpose of collective bargaining." (Section 9(b), 29 U. S. C. Section 159(b), provided, of course, the Board will give the task a try, which it has hithertofore not done.

Moreover, Respondent submits that a consideration of the case of Regional Director Taylor bears out Respondent's contention that the Board's "constitutional" test omits from the catagory of officers many union executives whom Congress intended to be considered officers and from whom Congress intended to require affidavits. If the facts as to Mr. Taylor's position were before the court it would be clear, Respondent believes, that Regional Director Taylor would properly

be considered an officer within the "functional" test: The C.I.O. and its affiliates comprise a vast organization of employees. Current membership in the C.I.O. unions totals approximately six million persons.[37] In view of this C.I.O. union empire, it would hardly be surprising to find that there are a number of executive positions of the greatest importance in the C.I.O., outside the very top group of the C.I.O. officers listed in the C.I.O. constitution. It may be that in a small local unit of a union the constitutional list of officers would in fact include all those executives whose authority is of such a nature that people would normally regard them as officers. But in the case of a labor federation like the C.I.O., Respondent submits that the constitutionally-designated offices cannot possibly include all those positions which properly are to be considered offices.

Respondent's claim is that it could show, if permitted, that Mr. Taylor had a working control over every C.I.O. local union and affiliated international union which operates within the confines of the Commonwealth of Kentucky and elsewhere within Taylor's region; that every action or move of importance relating to these C.I.O. unions is cleared through Mr. Taylor's office; that Mr. Taylor's influence frequently reaches the collective bargaining table; and that his power and prestige among the C.I.O. members of Kentucky is impressive and undeniable.

[37] *World Almanac* (1955), p. 58. This membership includes a very large portion of the nation's unionized working force. The A.F.L. is listed as containing 9,605,840 members, and membership in independent or unaffiliated unions is stated to approximate 2,500,000.

Indeed, the C.I.O. itself has considered the position of regional director to be one of the greatest importance in union affairs. The union newspaper, *The C.I.O. News*, carried an article in its October 24, 1949 issue, page 7, in which the following illuminating comments about the powers of the regional director appeared:

> "There are 41 . . . [regional directors] scattered throughout the country. And they have duties enough for ten times that number.
>
> "The 41 are CIO regional and sub-regional directors (36 of the former). They are CIO's link with local unions, with persons needing and desiring organization, with the community as a whole.
>
> "Theirs is the duty of preaching, talking, practicing and selling CIO in every nook and cranny of the land.
>
> "Regional directors form about a fourth of the 130 persons on the staff of CIO Vice President and Organization Director Allan S. Haywood. Others are Haywood's assistants, field representatives, organizers and office force. . . .
>
> "St. Louis is fairly close to the geographical center of America. It has a rather varied CIO membership. It has had a long and good labor history. . . . With no slight intended for anyone else, let's take a look at Delmond Garst, . . . regional director for Western Missouri and Southern Illinois (his region includes both the state capitals—Jefferson City, Mo., and Springfield, Ill.). In addition, he is Middle West director for the CIO Political Action Committee, covering Ohio, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Kansas,

Oklahoma and Missouri. And, he represents the Woodworkers in his area.

"Biggest unions in the area are the Auto Workers, the Steelworkers, the Electrical Workers (with the accompanying leftwing headache), Amalgamated Clothing, Textile, Brewery, Shoe, Gas-Coke, Newspaper Guild and, of course, the Communications Workers. Garst was extremely active in the drive which brought CWA into CIO.

"Del Garst, like all the other regional directors, came up through his own union. He's a native of Kentucky. A member of Local 25, UAW (United Auto Workers), St. Louis, he served the UAW for six years as a board member. In 1942, he was named CIO regional director for St. Louis. In August of that year, he was called to Washington for a two-week mission—and didn't get back to St. Louis permanently until nearly five years later.

"In the interim, he served CIO in various capacities during the war. His main work was on the War Labor Board. He signed the order which led to the famous forced removal by the Army of Sewell Avery from his Montgomery Ward offices . . . That's the background of Del Garst. It could just as well have been almost any of the other regional directors . . .

"Just what does a regional director do?

"Of course, there's a close work with the locals and internationals in this area. Whenever Garst wants to make a policy decision, he confers with representatives of the unions. Philip Weightman, former vice president of the Packinghouse

Workers, has been assigned to Garst by CIO and PAC, and attends conferences with the various affiliates . . . . Here's a typical schedule in the life of this typical regional director:

"A visit to the Unemployment Compensation office to make arrangements for quicker aid for CIO members.

"Conferences with Treasury drive officials. (CIO members are among the biggest investors in this drive.)

"A meeting of Community Chest leaders.

"A conference with the CIO Community Services Committee.

"A safety campaign conference.

"Visits to city officials to discuss municipal policies.

"A meeting with state officials.

"Negotiations for the amalgamated local industrial union, No. 1643, at St. Charles, Mo. (*The St. Charles Banner-News* is the only newspaper in America published by an all-CIO staff, mechanical, business office and editorial).

"Negotiations for the Woodworkers. (One local is 220 miles from St. Louis.)

"Negotiations for other unions when he is requested to enter the picture—which is often.

"Lots of organizational work; which has prospered under heavy handicaps in these Taft-Hartley days.

"Dictation and other office work with his secretary. . . .

"Conferences with A. F. Kojetinsky, Steelworkers' District 34 Director . . . .

"Speeches to college classes.

"Speeches to Kiwanis and other clubs.

"Speeches to church groups.

"Participation in CIO and civic forums.

"Participation in such activities as the regional CIO summer school, held last summer at Camp Monticelli, 20 miles from the city.

"Doing everything possible to have unions in his area carry out the adopted policies of National CIO. As an aid in this, he holds meetings twice a month with the various representatives and functionaries of the unions.

"Constant PAC work.

"(Missouri last year had just about the best PAC record of any state in the country. In Garst's big PAC district, the PAC-endorsed ticket of Truman and Barkley carried Ohio, Illinois, Wisconsin, Minnesota, Iowa, Nebraska, Oklahoma and Missouri. In all of the states, the liberal vote was vastly increased).

"A lot of trips to council meetings . . . .

"Dozens of phone calls on a wide range of subjects.

"An occasional trip to Washington, or some other city, for conferences with CIO President Philip Murray, Haywood, CIO Secretary-Treasurer James B. Carey, PAC Chairman Jack Kroll, and others.

"Lobbying in Springfield and Jefferson City for liberal measures."[38]

The article clearly indicates that the regional director is the "CIO's link with local unions, with persons needing and desiring organization, with the community as a whole." It also clearly indicates that

[38]The above excerpts from the article in the *C.I.O. News* appear in Marx, *American Labor Unions*, 43-45 (1950).

the regional director is in a position to make policy decisions. It states that whenever Garst wanted "to make a policy decision" he conferred with representatives of local and international unions in his area. He also does "everything possible to have the unions in his area carry out the adopted policies of the National C.I.O." Regional Director Garst was "extremely active" in bringing the Communications Workers into the C.I.O., and it is stated that he frequently enters into negotiations on labor-management relations for unions. The article also plainly indicates that Regional Director Garst engaged in a large amount of political activity in the state legislatures and also on the municipal level.

From this, Respondent respectfully submits that reasonable people would consider one who holds such a position an officer of the union. And Respondent submits that if it were shown that Regional Director Taylor exercises functions and duties comparable to those of the regional director described in the foregoing article it would be proper to hold him an officer within the meaning of Section 9(h).

Obviously the opportunities for a Communist in such a post to create friction in labor relations and to obstruct interstate commerce are immense. Certainly the policy of Congress to eradicate all opportunities for Communist domination of union organizations would not be achieved if regional directors are held not to be officers who must file affidavits. If the Board's "constitutional" test is upheld, wily Communists will merely seek those positions of influence

which are not denominated offices in the union constitution. The Board's "constitutional" test will become a shield behind which they may hide.

C. A "FUNCTIONAL" TEST FOR DETERMINING OFFICERSHIP IS CONSISTENT WITH THE ORDINARY AND USUAL MEANING OF THE TERM "OFFICER."

Congress saw and understood the potentiality for perversion of the labor movement if posts of executive power in the unions fell into the hands of the Communists (*supra*, pp. 44-47). It is not to be supposed that Congress, in devising the non-Communist affidavit filing requirement to check Communist infiltration into the unions, meant to have its anti-Communist labor policies frustrated by a narrow and excessively technical definition of the term "officers." Certainly a broad popular definition of "officer" is required in carrying out that strong legislative policy. How else would Congress intend to extirpate Communist leaders at "each and every level" of the American labor movement. This Court noted in *N. L. R. B.* v. *Highland Park*, 341 U. S. at 324, 325, that if Congress had meant the language of Section 9(h) to have other than its ordinarily accepted meaning, it would have provided special definitions. Since Congress has not specially defined "officers", it must have intended, therefore, that the term be used in its ordinary sense.

Indeed the Board agrees that the word is to be taken "in its usual and ordinary sense" (Petitioner's Brief, p. 50), although it disagrees with Respondent as to what is that meaning. It is clear then that both

sides of this case have committed themselves to the view that the definition of "officer" intended by Congress is the ordinary and usual meaning of the term.[39] But while the Board admits that the term "officer" should not be taken in some special and narrowly technical sense, nevertheless, it relies on technical rules from the law of corporations and advances the view that the term "officer" is to be applied only to those whose positions are denominated offices by the labor organization's constitution. (Petitioner's Brief, pp. 54, 55). It may be good corporation law, in deciding technical questions of corporate responsibility to stockholders and third persons who deal with the corporation, to look to the corporation charter to find the

[39] In the *Highland Park* case, where the question was whether the C.I.O. was a "national or international labor organization" within the meaning of Section 9(h), the Board argued that the language had a special and technical connotation in labor circles which excluded a labor federation such as the C.I.O. from its scope. Mr. Justice Frankfurter in a dissenting opinion expressed the view that the duty of the reviewing court was to "determine whether [the language in question has] a technical meaning when used in regard to matters of industrial relations." He thought that the best source for determining "whether a term used in the field of industrial relations has a technical connotation is the body to which Congress has committed the administration of the statute." And further he urged that, as nothing had been called to the attention of the court to suggest that the Board's technical construction of the phrase was not in accord with the meaning recognized in labor circles, the Court should accept in Board's view that the C.I.O. was not "national or international labor organization." 341 U. S. at 326, 327. The majority, however, found that Congress intended the word to be taken in its usual sense since Congress did not specially define the word, and that in the speech of the people the C.I.O. was a "national union." 341 U. S. at 324. It is clear that the problem of the possible technical meaning of language and accordingly of the proper reviewing function of the Court in such a situation does not arise in this case, since both parties regard the ordinary meaning of the term "officer" as the touchstone of decision.

offices of the corporation; but, it is submitted, such approach is wholly inappropriate where the problem is one of carrying into effect a broad legislative policy as is involved here.

If the touchstone for defining "officers" is the everyday meaning of the term, a good source for the most common meaning of the word as used in everyday parlance is an abridged dictionary. Webster's defines "officer" broadly as: "Position of trust, ministration, or authority . . . an executive position with a corporation, institution, etc." An "executive" is defined as: "any person or body charged with administrative or executive work." An officer is: "one who holds an office."[a] Judicial expression of the ordinary meaning of the term is consistent with the dictionary definition. In *Walters* v. *Bank of America*, 9 Cal. 2d 46, 69 P. 2d 839, 842 (1937), the Court held that the "ordinary and usual meaning" of the word "officer" was "an employee invested with a part of the executive authority and who has a position of trust or authority in the regular and continued employment of the corporation."

The Courts, in construing statutes so as to carry out the underlying legislative purpose have applied such a broad popular definition and have held that holders of executive posts were officers regardless of whether their positions are labelled "officers" in constitutions, charters, or by-laws of an organization.

[a] *Webster's Collegiate Dictionary* (abridged), Fifth Edition, 1953. The definition in *Webster's New International Dictionary* (unabridged) Second Edition, 1954, is not to the contrary. Similarly it defines an "office" as: "Position of trust or ministration."

In *Colby v. Klune*, 178 F. 2d 872, 873 (2d Cir. 1949), the Court in defining the term "offices" for the purpose of Section 16(b) of the *Securities Exchange Act of 1934*, 15 U. S. C. A. Section 78p, restricting "insider" profit-taking in corporate stock transactions, said:

> "It includes, *inter alia*, a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions. *It is immaterial how his functions are labelled or how defined in the by-laws*, or that he does or does not act under the supervision of some other corporate representative." (Emphasis added.)

In *E. Clemons Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 193 Pac. 105 (1920), it was held that the superintendent of a plant was an officer within the meaning of the workmen's compensation law providing for increasing the amount of recovery when an employee was injured by reason of the willful misconduct of an officer of the corporation.

And in *In re St. Lawrence & A. R. Co.*, 133 N. Y. 270, 31 N. E. 218 (1892), it was held that an attorney appointed by the railroad to certify petitions and pleadings for the institution of condemnation proceedings was an officer of the corporation within the statute requiring the petition in condemnation proceedings to be verified by an officer of the corporation.

D. THE SUBSEQUENT HISTORY OF ABORTIVE ATTEMPTS TO AMEND SECTION 9(h) DOES NOT SUPPORT THE CORRECTNESS OF THE "CONSTITUTIONAL" TEST.

The Board points out that certain proposals to extend the coverage of the affidavit-filing requirements were offered in Congress in the years following the enactment of Section 9(h) but were not passed. It is argued that these unsuccessful attempts to broaden Section 9(h) show that the proponents of such amendments read the term "officers" as the Board does and that the proponents recognized that substantial alteration of Section 9(h) was necessary to give that section the meaning urged by the Respondent (Petitioner's Brief, pp. 58-60).

But an analysis of these amendments clearly demonstrates the fallacy of this reasoning. For example, Senator Taft's amendment of 1949 would have required affidavits of "members of all policy-forming and governing bodies of the labor organizations as well as those designated as officers by the constitution of the labor organization."[78] This apparently would have meant that all delegates to a union convention should file non-Communist affidavits. Clearly this proposal went far beyond the "constitutional" test, and also would have extended the coverage to many who would not be considered "officers" even under the proposed "functional" test. The failure of such amendment indicates that Congress wished to confine the affidavit-filing requirement to persons who were

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[78] See, e.g., Sen. Rep. No. 99, Part 2, 81st Cong., 1st Sess., pp. 1, 45-48, 51-52.

"officers", *not that the term "officer" was intended to receive a restrictive definition at the hands of the Board.*

Certainly the fact that these amendments failed does not in any way suggest that the legislators thought the Board's "constitutional" test was reasonable and proper. The majority of Congress may have believed (as the Sixth Circuit in the instant case and the Seventh Circuit have now held, *supra*, pp. 50-52) that the reasonable interpretation of the term "officer" was the "functional" definition which Respondent proposes, and that an attempt to elaborate by amendment would introduce mere surplusage into Section 9(h).[12] We submit that this subsequent legislative history of Section 9(h) is too inconclusive to afford support of the "constitutional" test.

On the other hand we have the clear and repeated reference of the members of the Congress which enacted Section 9(h) to the union executives intended to be covered as the union "leaders" who are in "positions of authority and control" (*supra*, pp. 48-49). This indicates that the Congress had in mind the concept of an "officer" as one who exercises the duties and responsibility characteristic of a leader, which is the basis of the "functional" test but not of the "constitutional" test.

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[12]This is especially true in view of the fact that the question of the definition of "officers" had not been passed on by the courts until this case was heard and decided in February, 1955, by the Sixth Circuit (R. 541a), which was in the year after the last of the proposed amendments referred to by the Board (Petitioner's Brief, p. 59).

Certainly it seems that Congress did not intend the arbitrary line-drawing that results from the application of the "constitutional" test. For example, compare the powers and influence of a C.I.O. regional director such as the one described in the excerpt from the *C.I.O. News* (*supra*, pp. 56-60), with the position of the president of a local union or of a small independent union. Surely one would have to admit that the opportunities open for a Communist are greater in the case of the regional director acting on a statewide level than in the case of the officer of the local whose jurisdiction extends only to a relative handful of workers. If the test for determining officers is to be keyed to "leadership" and to the characteristics of "authority and control," as the legislative history of the statute certainly indicates, one would surely regard a regional director as the greater officer of the two. Yet under the "constitutional" test, the president of the local, because he is listed in the local's constitution, will have to file an affidavit, but the regional director will not.

E. THE BOARD'S "CONSTITUTIONAL" TEST IS PATENTLY UNREASONABLE AND ARBITRARY.

Respondent contends that the Board's constitutional test is so arbitrary and unreasonable that it cannot be permitted to stand.

The Board's "constitutional" test for the most part ignores the realities of union leadership. The Board, under its test, does not have cause to investigate the facts as to the duties and functions of labor

leaders, since the decision as to officership depends upon the circumstances that a union leader is or is not designated as "officer" by the terms of the constitution of his union. As a result, the Board's test utterly fails in drawing the line between officers and non-officers, to distinguish big unions from small, locals from international unions or labor federations. The same "constitutional" test is applied to all types of unions of whatever size. It may be that the list of officers contained in the constitution of some small local includes just about all the leaders whose duties and functions reach official stature. But surely the vast official powers and duties exercised in a great labor federation, or in a large international union must be distributed among a more numerous personnel than the limited number of officers who are named in its constitution.[13]

Even as between two unions of approximately equal size and rank in the hierarchy of union organizations ranging from the locals to the federations, the group of officers in one of the unions may not be the same under the Board's test as the group of officers in the

[13]The record in this case illustrates an anomalous situation which results from the "constitutional" test. A letter of January 16, 1952, from the Board to the Respondent (Respondent's Exhibit No. 6, R. 27a-29a) listed the charging United Brewery Workers Local 20 as having at that date sixteen officers, the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America as having only four officers, and the C.I.O. with eleven. Presumably these lists of officers were the group of officers so designated in the respective constitutions of these organizations. It is hard to believe that there were not more than four persons in the large parent International who exercised the duties and functions associated with high official leadership when the smaller unit, the Local, had sixteen whom even the Board regarded as officers.

other union. Glaring discrepancies may result between the two unions because the constitution of one local may differ from that of another in respect to the exact number and kind of positions listed as offices. Common experience with the organizational structures of associated groups of people of whatever sort suggests the possibility that one labor union may, for example, choose to dignify the holder of a certain executive post with the title of Vice-president while another union may withhold this titular honor from one holding an analogous position in its union ranks. The Board itself implies as much. Petitioner's brief (p. 61) suggests that Congress could have extended the coverage of Section 9(h) to international representatives, organizers, coordinators, stewards committeemen, etc., irrespective of whether their posts are denominated in the union constitution, but that Congress did not do so. The Board then adds that if any of these "officials" are in fact designated as "officers" in a particular union's constitution, they are required to file non-Communist affidavits (Petitioner's brief, p. 61, fn. 33).

The *Goodman Mfg. Co.* case (*supra*, pp. 30-32), presents another instance of awkward results stemming from the "constitutional" test. In that case, the posts of the union leaders whose officership status was in question, the district secretaries and the trustees of the international union, were expressly created in the union constitution. But although that constitution outlined the duties and functions of these individuals, it did not denominate their positions as "offices", and so the

Board did not regard the incumbents as "officers." The Seventh Circuit Court of Appeals, however, rejected the Board's technical insistence on designation *qua* "office." That Court held that characterization as officers could not be denied to those who hold positions of obvious responsibility and trust, which in the labor organization's own view are of sufficient importance to be established by its constitution.

It is respectfully submitted, therefore, that in view of the arbitrary results which flow from the Board's "constitutional test", it cannot be permitted to stand.

F. THE BOARD'S CONSTRUCTION AND APPLICATION OF THE TERM "OFFICER" IS NOT ENTITLED TO THE DEFERENCE WHICH THE BOARD CLAIMS FOR IT.

(a) BECAUSE THE QUESTION PRESENTED IS ONE OF THE ORDINARY AND USUAL MEANING OF THE LANGUAGE USED BY CONGRESS.

(b) BECAUSE THE BOARD IMPROPERLY DELEGATES THE RESPONSIBILITY FOR THE DETERMINATION OF OFFICER STATUS TO THE UNIONS UNDER THE "CONSTITUTIONAL" TEST.

The Board in its closing argument in substance urges this Court to defer to its construction and application of the term "officer" embodied in the "constitutional" test (Petitioner's brief, pp. 65, 66). Respondent submits that, in any case, if the test for review of this case should be held to be "reasonableness and not rightness," as the Board asserts, this Court should strike down the Board's "constitutional" test as applied here. In view of the foregoing arguments, demonstrating that the Board's test narrowly restricts the coverage of the Section 9(h), contrary to the intent of Congress to drive out Communist "leadership" from

the American labor movement and that the results of the application of that test lead to extremely arbitrary and anomalous results, the Board's test cannot be said even to be reasonable. However, Respondent contends that it is inappropriate for this Court to defer to the Board's administrative ruling under the circumstances of this case.

The Board urges that this Court should defer to its construction and application of the term "officers" under the authority of *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111 (1944); *Gray v. Powell*, 314 U. S. 402 (1941); *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (1939). In each of these cases the agency involved was able to support the reasonableness of its construction and application of the law by factual data illustrating the appropriateness of its ruling, as the discussions of the facts presented in these cases by the writers of the opinions therein indicate. And, the test of judicial deference in this group of cases was summed up in the most recent of them, the *Hearst Publications* case, as follows: "The Board's determination . . . is to be accepted, if it has 'warrant in the record' and a reasonable basis in the law." 322 U. S. 111, 131 (1944).

These decisions clearly have no application in the case at hand because, here, unlike the situations presented in those cases, the Board does not purport to base its construction and application of the law upon a careful investigation of the facts as to the incidence of power and leadership in labor unions generally or in the particular unions herein involved. Indeed the

issue in this case is whether a consideration of the duties and functions of Regional Director Taylor, *which the Board has not undertaken*, is relevant and necessary for a proper decision as to Taylor's alleged status as an officer. Respondent submits that it is impossible to apply in this case the rule of "warrant in the record" when the record contains no factual information as to Regional Director Taylor's position or his duties and functions in the union.

The Board does not present as support for its construction and application of the term "officers" any factual data, which is the fruit of an investigation or consideration as to the facts of leadership and official power in the unions. Rather, it urges that its "constitutional" test is consistent with the ordinary and usual meaning of "officers" (Petitioner's brief, pp. 50-55). Since the Board places the question on that level, there is no occasion for judicial deference to the Board's definition. For when words are used in their ordinary meaning their construction presents a question solely of law, an issue fully appropriate for the exercise of the widest scope of judicial review. Accord: *Great Northern Railway Co.* v. *Merchants' Elevator Company*, 259 U. S. 285, 291-296 (1922). And when this Court has found that Congress used language in Section 9(h) in its "ordinarily accepted sense," it has been concerned in reviewing the Board's ruling to determine whether the Board's construction is correct, not merely reasonable. *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. at 324, 325 (Compare Mr. Justice Douglas' dissent at pages 327, 328).

The Board also urges that its construction of Section 9(h) should be given great weight since it is the agency to which is entrusted the administration of the statute (Petitioner's brief, p. 65). But actually the Board has vacated and abandoned in considerable measure, if not entirely, that responsibility which the Board claims for itself for making a workable definition of the term "officer." It has in fact transferred that duty to the labor organizations. A union may define its officers as it likes by calling or not calling an executive position an office in the union constitution. It seems an extraordinary request to ask the courts to defer to a construction of the statute which is ultimately controlled by the very unions which it was the purpose of Congress to regulate.

CONCLUSION.

Respondent believes that the Board's process of decision as to the compliance status of union by application of the "constitutional" test, without investigating the facts as to the duties and functions of important union executives who are not designated in the union constitution as officers, is plainly wrong. Therefore, it is respectfully submitted that the Court of Appeals below correctly ordered the case remanded to the National Labor Relations Board with instruction to permit Respondent to introduce testimony as to the functions and extent of jurisdiction of W. B. Taylor as Regional Director of the C.I.O.

It is respectfully submitted that, for the foregoing reasons, the order of the Court of Appeals, Sixth Circuit, should be affirmed.

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APPENDIX.

Statute and Rule Involved.

A. Provisions of Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h).

Representatives and Elections.

Sec. 9.

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal years, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue

under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-months period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

B. Provisions of Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. (1955 Supp.) 102.13.

Sec. 102.13. Compliance with section 9 (f), (g), and (h) of the act. (a) For the purpose of the rules and regulations in this part, compliance with section 9 (f) and (g) of the act means (1) that the Secretary of Labor has issued to the labor organization, pursuant to the rules of the Department of Labor, a letter showing that the labor organization has filed the material required under section 9 (f) and (g) of the act; (2) that the labor organization has filed with the general counsel in Washington, D. C., or with the

regional director, either as part of the charge (or petition) or otherwise; the duplicate copy of such compliance letter; and (3) that the labor organization has filed with the general counsel or with the regional director for the region in which the proceeding is pending or in which it customarily files cases, either as part of the charge (or petition) or otherwise, a declaration executed by an authorized agent stating that the labor organization has complied with section 9 (f) (B) (2) of the act requiring that it furnish to all of its members copies of the financial report filed with the Department of Labor, and setting forth the method by which such compliance was made.

(b) For the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge, (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any

organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9(h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.